Nos. 682, 683

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. STEVE ANDERSON, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

L. H. PRICHARD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14–17) is unreported. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 79–84) is reported in 107 F. (2d) 459.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit was entered on November 1, 1939 (R. 84). Petition for writs of certiorari was filed January 30, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A sells oil lands and rights to B for $50,000, plus an additional $110,000 to be paid out of one-half of the proceeds received by B from oil and gas produced from the properties and from the sale of any of the lands conveyed to him. In 1932, B received income by way of proceeds from the properties, one-half of which he paid over to A in pursuance of the above arrangement. Is B to be relieved of income tax upon the proceeds thus paid over to A?

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 14–16), may be summarized as follows:

On March 19, 1931, Oklahoma City Company entered into a written contract with petitioner Prichard providing for the sale to Prichard of certain royalty interests, fee interests, and deferred oil payments in properties in Oklahoma. Prichard agreed to pay the Company $50,000 in cash and also one-half of the proceeds received by him from the sale of oil and gas produced from the properties and from the sale of any of the lands conveyed to him, until the Company had received $110,000 in addition to the $50,000. Interest at the rate of 6 percent per annum was to be paid from proceeds of sales or production upon any unpaid balance of the $110,000. The Company transferred the properties to Prichard immediately but retained a lien upon the properties and products to secure payment of the $110,000 and interest. (R. 14–15.)

In entering into this agreement, Prichard acted not only for himself but also for petitioner Anderson and for one Olsen, as set forth in a declaration of trust dated March 23, 1931. Prichard and Anderson each had a 45 percent interest and Olsen had a 10 percent interest. (R. 15.)

During the tax year 1932, Prichard received all the proceeds from the properties and, pursuant to the contract, distributed one-half of the gross proceeds to the Oklahoma City Company (R. 15). The

Commissioner, in determining deficiencies against both Prichard and Anderson, added to the gross income of each his proportionate share of the amount paid to the Company during the taxable year. This action of the Commissioner was sustained by the Board of Tax Appeals (R. 16), and the court below affirmed (R. 84).

ARGUMENT

On principle, the decision of the court below is entirely correct. The contract of March 19, 1931, provided for an outright sale of the properties to Prichard [1] for a consideration of $160,000, payable $50,000 in cash and $110,000 from one-half of the proceeds from the properties if, as, and when received. After the execution of the contract, all legal and equitable interests in the properties belonged to Prichard (subject only to the Oklahoma Company's lien to secure payment of the $110,000) and all income from the properties was therefore his income. The fact that Prichard was under a contractual obligation to pay over one-half of the proceeds in payment of the purchase price did not affect either the nature of his ownership of the properties or the nature of his interest in the proceeds of the properties. Consequently, the

[1] As above stated, in the transactions with the Oklahoma Company Prichard was acting for himself, for Anderson, and for Olsen, who did not file a petition with this Court. However, for purposes of convenience, we shall discuss the question as though Prichard had acted solely for himself.

court below correctly sustained the Commissioner in including those proceeds in Prichard's gross income.

Thomas v. *Perkins*, 301 U. S. 655, relied upon by petitioner, is distinguishable. That case involved an assignment of oil leases pursuant to which the assignors received $395,000 "to be paid out of the oil produced and saved from the * * * lands, and to be one-fourth of all the oil produced and saved * * * until the full sum * * * is paid * * *" (p. 657). It was agreed between the parties that the $395,000 was payable out of oil only and that it should not be a personal obligation of the assignee. The instrument did not purport to reserve a lien. The court construed the agreement as withholding "from the operation of the grant one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000" (p. 659). This construction was based upon the provisions for payment in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of the assignors to take any security by way of lien. It was also supported by the fact that when the oil was sold, the purchaser was furnished with a division order designating the quantities of the oil belonging to the assignors and the assignee and directing that a proportionate part of the purchase price be paid directly to the assignors. Under these circumstances, the Court held that the moneys received by the assignors from

the sale of the oil was not income to the assignee. The basis of the decision was that ownership of the oil from the sale of which these moneys were derived had not been conveyed to the assignee but remained in the assignors.

The contract here involved is substantially different from the instrument of assignment involved in the *Thomas* case. The provisions of the contract evidence the unequivocal intention of the parties to make an absolute sale of the properties for $50,000 in cash and $110,000 payable out of one-half of the proceeds from sales of oil, gas, and land. The Oklahoma Company reserved nothing more than a lien on one-half of the proceeds to secure the unpaid balance of the purchase price. Plainly the reservation of this lien negatives any contention that the Company intended to withhold from the grant one-half of the oil and gas to be produced up to an amount sufficient when sold to pay the unpaid purchase price; the vendor could not retain title and at the same time reserve a lien. Moreover, the contract did not provide for payments in oil, as did the assignment in the *Thomas* case, nor did it provide for direct payment to the Oklahoma Company by purchasers of the oil and gas of one-half of the purchase price. On the contrary, it expressly provided that the purchase price should be paid directly to Prichard and that he should deposit one-half of the payments to the Oklahoma Company's credit at intervals of ninety days at a designated bank (R. 22). The contract provision for the pay-

ment of interest on any unpaid balance of the $110,000 is also inconsistent with the contention that there was not an outright sale of all of the Company's title and interest in the properties. So, too, is the fact that Prichard had the right to sell and convey the properties and interests covered by the contract and pay the $110,000 out of the proceeds of such sale rather than out of the proceeds of gas and oil produced from the properties. Such a right would seem plainly to negative any idea that the Oklahoma Company retained an interest in the oil in place. Finally, the provision that a copy of the agreement and a "release" be placed in escrow for delivery to Prichard upon full payment of the $110,000 and interest (R. 22) indicates that the parties intended an outright sale; this provision clearly contemplates the extinction of a lien rather than the transfer of title or of a beneficial interest, for which purpose a deed would normally be employed.

The fact that the contract provided for payments out of one-half of the proceeds, up to $110,000, in addition to an immediate cash consideration, does not preclude an absolute transfer to Prichard of all the Oklahoma Company's interest in the properties conveyed. Cf. *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372; *Helvering* v. *O'Donnell*, 303 U. S. 370. Nor is a "mere economic advantage" derived from the property "through a contractual relation to the owner" equivalent to the retention of an economic interest or investment in

the property. See *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 367; *Helvering* v. *O'Donnell, supra*, at 372.[2]

It is true that the lower federal courts have applied the rule of *Thomas* v. *Perkins* to situations more closely akin to the present case than was the situation in the *Thomas* case itself. *Holly Development Co.* v. *Commissioner*, 93 F. (2d) 146 (C. C. A. 9th); *Commissioner* v. *Elliott Petroleum Corp.*, 82 F. (2d) 193 (C. C. A. 9th); *Spalding* v. *United States*, 97 F. (2d) 697 (C. C. A. 9th), certiorari denied, 305 U. S. 644; *Commissioner* v. *Fleming*, 82 F. (2d) 324 (C. C. A. 5th); *Commissioner* v. *Williams*, 82 F. (2d) 328 (C. C. A. 5th); *Dearing* v. *Commissioner*, 102 F. (2d) 91 (C. C. A. 5th). Each of these cases is distinguishable from the present case on one or more of the grounds set forth above as distinguishing the *Thomas* case. The dis-

[2] Petitioners rely upon *Palmer* v. *Bender*, 287 U. S. 551, in which the Court held that the right to a depletion allowance is not dependent upon the retention of ownership but upon the retention of an economic interest in the oil in place. The taxpayer was held entitled to depletion allowances because, for the transfer of operating rights, he was to receive royalties from production and thus retained an economic interest. In *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372, 375–376, however, the Court distinguished payments of the purchase price upon an absolute sale from "bonus" or "royalty" payments within the meaning of its decisions allowing depletion on such payments and held that where the taxpayer disposed of the property it was not entitled to any depletion allowance even though it had a right under the sale contract to participate in the proceeds.

tinctions are not in every case as satisfactory as in the *Thomas* case itself. For example, the principal difference between the case at bar and *Holly Development Co.* v. *Commissioner, supra,* seems to be the absence of a lien in the *Holly* case and the right of the vendee in the present case to sell the properties and pay the remainder of the purchase price from the proceeds of the sale. However, because under the rule in *Thomas* v. *Perkins,* decision seems to turn upon the nature of the particular instrument involved in each case, because no question of great importance is involved, and because the decision below, upon the facts here presented, is clearly sound, there is, we believe, no occasion for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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